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Nos. 79-743, 79-5612 and 79-5624

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROYCE N. MOORE, PETITIONER
v.
UNITED STATES OF AMERICA

MICHAEL PALMER, PETITIONER
v.
UNITED STATES OF AMERICA

SHEILA RICHARDSON, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1979. The petitions for a writ of certiorari were filed on November 7, 1979 (No. 79-5612),

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[1]"Pet. App." refers to the appendix to the petition in No. 79-743.

November 8, 1979 (No. 79-743), and November 9, 1979 (No. 79-5624). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether police officers violated the Fourth Amendment in entering the common areas of a large apartment building that employs a doorman.

2. Whether the officers had probable cause to arrest petitioners.

3. Assuming probable cause existed, whether the officers acted improperly in arresting petitioner without a warrant.

4. Whether evidence found in the apartment was seized pursuant to a lawful examination of the premises incident to the arrest.

STATEMENT

In an indictment filed on September 19, 1978, in the United States District Court for the Southern District of New York, petitioners were charged with possessing one kilogram of cocaine with intent to distribute it, in violation of 21 U.S.C. 812, 841(a)(1), and 841(b)(1)(A). Petitioners Richardson and Palmer were also charged in another count with conspiring to distribute controlled substances, in violation of 21 U.S.C. 846. Following denial of petitioners' pretrial motions to suppress certain evidence, petitioner Richardson pleaded guilty to the substantive count and petitioner Palmer pleaded guilty to the conspiracy count (Pet. App. 2a).[2] Each was sentenced to imprisonment for a term of one year, to be followed

[2]In each of these cases the government and the district court consented to the preservation of the petitioner's right to appeal the denial of the suppression motion.

by a special parole term of three years (79-5624 Pet. 3). Following a jury trial, petitioner Moore was convicted of the substantive offense. He was sentenced to five years' imprisonment and three years' special parole (Tr. 768-769).[3] The court of appeals affirmed (Pet. App. 1a-5a).

The evidence adduced at the suppression hearing and at trial established that during August 1978 petitioner Palmer conducted a series of negotiations with James Glauner, an undercover agent of the Drug Enforcement Administration, concerning the sale by Palmer of six ounces of cocaine for $10,000 (Tr. 56, 60-63). On August 22, 1978, Palmer and Agent Glauner met in Glauner's automobile to conclude the transaction (Tr. 63-64). At the meeting Palmer said that he would take the money and return with the drugs, but Glauner refused to turn over the money until he was given the drugs (Tr. 65). Palmer then left Glauner and went to petitioner Richardson's apartment building to attempt to obtain the cocaine (Pet. App. 3a; Tr. 65). Another DEA agent, Jeffrey Hall, followed Palmer and heard him tell the doorman that he wanted to visit apartment 18-E, which was Richardson's apartment (Tr. 109-110). After identifying himself to the doorman, Agent Hall told the doorman he wanted to go to the 18th floor, and the doorman said he could do so (Tr. 110-111). While a third agent remained with the doorman to ensure that he would not advise Palmer and Richardson of Agent Hall's presence, Hall went up to the 18th floor.[4] From the stairwell on that floor, Hall observed Palmer leave Richardson's apartment and return to Glauner's automobile (Tr. 111-114).

[3]"Tr." refers to the trial transcript; "S.H. Tr." refers to the transcript of the suppression hearing.

[4]This agent remained with the doorman until petitioners were arrested (Tr. 116).

Palmer notified Glauner that the cocaine was being held by a woman in a nearby apartment who refused to release it prior to payment. He then returned to Richardson's apartment in another attempt to conclude the sale (Tr. 66, 92). Palmer was again followed by Agent Hall and another government agent (Tr. 92, 114). When the agents reached the building entrance, the doorman volunteered to them that Palmer had just taken an elevator upstairs, and the two agents then went up to the 18th floor (Tr. 92, 114-115).

When the two DEA agents reached Richardson's apartment, Hall pressed his ear to the door and listened (Tr. 93). He heard Palmer tell Richardson that he had counted the money and that Glauner had the full $10,000. When Richardson responded that she could not let the cocaine out of the apartment, Palmer said "[w]ell, I tried." Richardson said that she had also tried, and told Palmer to tell Glauner that they would have to "pass" (Tr. 93, 116-119; S.H. Tr. 63-65).

Shortly after this conversation, with the two agents standing directly outside the apartment, Palmer opened the door fully (Tr. 94). The two agents then stepped into the apartment and arrested Palmer and Richardson (Tr. 94). A security check of the remainder of the apartment for additional persons resulted in the discovery and arrest of petitioner Moore in another room and the seizure of quantities of cocaine and drug paraphernalia that were in plain view (Tr. 94-99, 130-136, 154-156, 246-252).

ARGUMENT

Petitioners advance several reasons in support of their claim that the seized evidence should have been suppressed.

1. Petitioners first contend (79-743 Pet. 5-6; 79-5612 Pet. 8; 79-5624 Pet. 9-16) that the entry of the DEA agents into the hallway of the apartment building outside Richardson's apartment violated the Fourth Amendment and that evidence flowing from that entry should have been suppressed. The court of appeals properly rejected this claim, noting that "where government agents enter peaceably, as they did here, the Fourth Amendment is not offended by their presence in common areas of apartment buildings, such as stairways or halls" (Pet. App. 2a). See *United States* v. *Penco*, No. 78-1182 (2d Cir. Sept. 6, 1979); *United States* v. *Wilkes*, 451 F. 2d 938, 941 n.6 (2d Cir. 1971); *United States* v. *Llanes*, 398 F. 2d 880 (2d Cir. 1968), cert. denied, 393 U.S. 1032 (1969).

Petitioners rely heavily on the fact that a doorman was present to regulate entry into the building and announce visitors, but this fact does not create a reasonable expectation of privacy by an individual tenant in the common areas of the building. See *United States* v. *Penco*, *supra*. A tenant has no expectation that anyone other than his own visitors will be announced to him by the doorman. The common areas of an apartment building are used by many people unknown to the individual tenant, such as other tenants, their guests, and service and delivery personnel, and he has no right to exclude them. Accordingly, he has no reasonable expectation of privacy in these common areas. See *United States* v. *Eisler*, 567 F. 2d 814, 816 (8th Cir. 1977). Cf. *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969).

The function of the doorman is to provide security by barring entry to those without a legitimate purpose on the premises. His function is not to bar law enforcement

officers from entering the building in the execution of their duties or to warn criminals of the presence of policemen. Thus, the doorman acted properly in permitting the agents to enter and their entry into the hallway did not violate the Fourth Amendment. As the Eighth Circuit stated in *United States* v. *Eisler*, *supra*, 567 F. 2d at 816, the restraints on entry to the apartment building "were to provide security to the occupants, not privacy in common hallways. * * * An expectation of privacy necessarily implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions" (emphasis in original).

Petitioners' contention that the decision of the court of appeals conflicts with decisions of other circuits is without foundation. In *United States* v. *Carriger*, 541 F. 2d 545 (6th Cir. 1976), a federal agent stealthily entered a locked apartment building, which contained only twelve units, as some workmen exited. The court relied on the fact that the agent was a "trespasser" in holding that this entry violated the Fourth Amendment. 541 F. 2d at 549-551. Here, by contrast, the agents used no force or deception. They were in the building lawfully because the doorman allowed them to enter. In *United States* v. *Case*, 435 F. 2d 766 (7th Cir. 1970), the court found a reasonable expectation of privacy in a locked, non-public area adjoining the defendant's store that was usually used only by the proprietors of the four stores that adjoined it and, at most, was accessible to only "a very confined group," 435 F. 2d at 769. In *United States* v. *Fluker*, 543 F. 2d 709 (9th Cir. 1976), the court held that agents had failed to comply with 18 U.S.C. 3109 in executing a search warrant by failing to knock on a hallway entrance door leading to two basement apartments. In carefully limiting its holding, the court specifically noted that it was not dealing with a building

containing many individual apartments where there would be less of an expectation of privacy. 543 F. 2d at 716-717. The expectation of privacy in the hallway involved in *Fluker* was such that the tenant of one of the basement apartments, in reliance on the locked outer door, actually kept the door to his apartment open. 543 F. 2d at 716.

2. Petitioners also contend (79-743 Pet. 8-10, 79-5612 Pet. 8-9, 79-5624 Pet. 16-23) that the agents violated the Fourth Amendment by placing their ear to the door to overhear the conversation taking place in the apartment. As the court of appeals pointed out (Pet. App. 3a), the question of the legality of this action is not presented here because the agents had probable cause to arrest even without the overheard conversation. Thus, even if the eavesdropping were found to be improper, that finding would not be grounds for suppression of the evidence seized in the apartment.[5]

Petitioner Richardson contends (Pet. 24-28) that the agents lacked probable cause to arrest her. This contention is without foundation. The overheard conversation clearly established probable cause. Even if they had not overheard the conversation, the agents knew that Palmer was engaged in a cocaine transaction and that he had stated that the cocaine was being held by a woman.[6] After twice following Palmer to Richardson's

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[5]In any event, it is well established that the occupant of an apartment has no protected expectation of privacy in a conversation that is audible outside the apartment without the aid of any mechanical or electronic devices. See *United States* v. *Wilkes*, *supra*; *United States* v. *Llanes*, *supra*.

[6]As a participant in the crime, Palmer was not subject to the standards of *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964), for reliability of an informant. See *United States* v. *Dunloy*, 584 F. 2d 6, 10 (2d Cir. 1978).

apartment and finding Richardson next to Palmer when the door opened, the agents had ample cause to believe that Richardson was the woman who was holding the cocaine. Accordingly, the court below decided this purely factual question correctly.

3. Petitioner Richardson also contends (Pet. 28-38) that, even if probable cause existed, the warrantless entry into the apartment to make the arrests was improper. This claim is without merit.

The absence of a warrant in this case was justified by exigent circumstances (see Pet. App. 3a). The agents were clearly compromised when petitioners surprised them in the hallway by suddenly opening the door to the apartment (*ibid.*). With their purpose known, or at least suspected, expeditious action by the agents was necessary, not only for their protection and to prevent petitioners' escape, but to avoid the significant possibility that the cocaine involved in the sale would be destroyed.[7] The agents had no opportunity to get a warrant, as they had been led to Richardson's apartment only a few minutes before. Accordingly, the possibility of petitioners' escape and the destruction of the cocaine created exigent circumstances that amply authorized the warrantless arrest. See *United States* v. *Campbell*, 581 F. 2d 22, 26 (2d Cir. 1978); *United States* v. *Manning*, 448

[7]Petitioner Moore argues (79-743 Pet. 7-8) that the act of eavesdropping was unlawful, and thus the agents are not entitled to rely upon any exigent circumstances arising from that act. As noted in note 5, *supra*, the eavesdropping was consistent with the Fourth Amendment, and, in any event, it was the agents' lawful presence in the hallway when Palmer opened the door to the apartment, not the eavesdropping itself, that created the exigency.

F. 2d 992, 1001 (2d Cir.) (en banc), cert. denied, 404 U.S. 995 (1971); *United States* v. *Davis*, 461 F. 2d 1026, 1031-1032 (3d Cir. 1972).[8]

4. Finally, petitioner Richardson contends (Pet. 39-48) that the warrantless examination of the apartment exceeded the scope of a lawful search incident to an arrest under *Chimel* v. *California*, 395 U.S. 752 (1969). This contention is erroneous.

It was proper for the agents to conduct a cursory examination of the apartment following the arrest to determine if anyone else was present who might threaten their safety or destroy evidence. *United States* v. *Christophe*, 470 F. 2d 865, 869 (2d Cir.), cert. denied, 411 U.S. 964 (1972). See also *Johnson* v. *United States*, 333 U.S. 10, 14-15 (1948); *United States* v. *Blake*, 484 F. 2d 50, 54-55 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974). In fact, the agents had strong reason to believe that evidence would be destroyed if they did not check the apartment for other persons. Palmer had indicated that another person might be in the apartment and the agents knew that cocaine was present in the apartment.[9] Therefore, even for those courts that do not permit

[8]Since the agents' entry was occasioned by exigent circumstances, this case does not present the issue now before this Court in *Payton* v. *New York*, No. 78-5421 (probable jurisdiction noted December 11, 1978), and *Riddick* v. *New York*, No. 78-5421 (probable jurisdiction noted December 11, 1978), concerning a warrantless entry into a private place to effect an arrest in the absence of exigent circumstances. The Second Circuit, which rejected petitioners' contention here, is one of the courts that has ruled that a warrant is required, if the opportunity exists to procure one, in order to enter a residence to make an arrest. *United States* v. *Reed*, 572 F. 2d 412 (1978).

[9]Palmer had referred in his conversation with Agent Glauner to "his friends" who had the apartment (Tr. 63).

officers automatically to make a "protective sweep" of an area, sufficient exigent circumstances existed—the probable presence of another person who could threaten the agents' safety and destroy the contraband—to permit the cursory inspection of the apartment. See *United States* v. *Dien*, No. 79-1036 (2d Cir. October 26, 1979) slip op. 5249-5250; *United States* v. *Cooks*, 493 F. 2d 668 (7th Cir. 1974). Petitioner Moore and the items of evidence, including cocaine and drug paraphernalia, that were found in the apartment during this cursory inspection by the agents were in plain view (Pet. App. 3a),[10] and there is no suggestion that the brief inspection of the apartment was a pretext for a search for evidence.[11]

Petitioner Richardson's argument (Pet. 40-41) that her Fourth Amendment rights were violated because Agent Hall did not physically seize the evidence in the room when he first observed it is insubstantial. Agent Hall had the right to seize the evidence at that time, but he acted

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[10]Some time after the arrest, two agents and petitioner Moore went into the back bedroom, away from the other petitioners, to solicit Moore's cooperation. There, Agent Hall saw a playing card and business card, both covered with a white powdery residue, on top of the night table. He also saw a bottle of Inositol and a strainer in the open closet (S.H. Tr. 86-88, 90). The agents' act in separating Moore from the other petitioners and taking him into this room was entirely reasonable under the Fourth Amendment. The district court, therefore, properly refused to suppress this evidence as well.

[11]Petitioner Richardson also attacks (Pet. 42-43, 45-46) the seizure of two items, a gun and a quantity of mannitol powder, that arguably were not within the plain view of the agents. As the court of appeals recognized, however, any error in failing to suppress these materials was harmless as they were not introduced into evidence at trial. The attorneys for petitioners Richardson and Palmer were informed before entering their guilty pleas that the government would not use those items in evidence (Pet. App. 4a).

reasonably in securing Moore before physically seizing the previously observed evidence. The short delay in effecting the seizure did not offend petitioners' rights in any way, and it was proper to return to seize the evidence that clearly could have lawfully been seized a few minutes earlier. See *United States* v. *Oaxaca*, 569 F. 2d 518 (9th Cir. 1978); cf. *Texas* v. *White*, 423 U.S. 67, 68 (1975); *United States* v. *Edwards*, 415 U.S. 800, 803 (1974).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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